MBF FINANCE BHD

v.

TIONG KIENG SENG

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[CIVIL APPEAL NO: 11-5-2000]
29 JUNE 2001

CIVIL PROCEDURE: *Default judgment - Setting aside - Application to set aside judgment in default of appearance - Conditions precedent - Whether judgment regularly or irregularly obtained*

CIVIL PROCEDURE: *Service - Post, service by - Whether service irregular - AR registered post - Conditions to be fulfilled - Order 7 rr. 1 & 7A SCR - Presumption under s. 12 Interpretation Act 1967*

CONTRACT: *Hire-purchase - Guarantee - Whether all pages need to be initialed - Whether failure to do so deemed agreement to be not in writing - Null and void - First Schedule, Hire-Purchase Act 1967*

The appellant had entered into a hire-purchase agreement with one Kayacom Resources Sdn Bhd ('1st defendant') of which the respondent was a director. Proceedings were instituted against the 1st defendant, the respondent as 2nd defendant and another guarantor as 3rd defendant. Based on the address provided by the respondent and in the absence of any notification of a change, the appellant effected service of the summons on the respondent by sending it through AR registered post to "1L (1st Floor), Jalan Emplan, 96000 Sibu." Subsequently, on 11 March 1989 at the hearing date, the respondent being absent, the appellant obtained judgment in default of appearance against him. The respondent applied successfully to set aside the default judgment on the grounds that it had been irregularly obtained as he had never been served with or received the summons and that he had a defence on the merits. This was the appellant's appeal against the magistrate's decision.

Held:

[1] A judgment in default obtained irregularly will be set aside as of right, and where the judgment has been regularly procured a defence on the merits will have to be shown.

[2] To show that the judgment was obtained regularly it would have to be prove that the summons had been properly served upon the respondent as per the stipulated rules. There is a fundamental difference between personal service and postal service – actual physical delivery is of the essence in the former whilst compliance with stipulated rules will suffice in the latter, which will thereafter invite the presumption under s. 12 of the Interpretation Act 1967 that service has been effected. The appellant had diligently adhered to the Subordinate Court Rules 1980 ('SCR') pertaining to service of process by sending the summons to the respondent by AR registered post to his last known address. Where service is effected by post, the party resorting thereto has only to show proof of posting to enable him to rely on the presumption of service. The written receipt as envisaged by O. 7 r. 7A SCR and procured under the Post Office Rules 1947 showed that the appellant had correctly addressed, prepaid and delivered to the post office the letter enclosing the summons which had been duly acknowledged by the postal authorities. The appellant had by the production of the written receipt authenticated by the postal authorities proved service of the summons in accordance with O. 7 rr. 1 and 7A SCR. A summons sent by AR registered post is merely a more sophisticated method of sending the same by prepaid post. The predominant and essential feature of posting *via* registered post is that it provides evidence of posting and the respondent's submission that O. 7 r. 7A SCR is strictly confined to prepaid registered post only was erroneous. There was affidavit evidence by the postman who delivered the summons which conclusively proved that the summons was not delivered to No. 11 (1st Floor), Jalan Emplan, 96000 Sibu as alleged by the respondent. The summons had been received and acknowledged by one Mah Chee Ming who represented himself to be from Kayacom Sdn Bhd, the 1st defendant. The respondent's attempt to rebut the presumption of *prima facie* proof of service failed. Consequently the respondent had not been able to show that the judgment was irregularly procured so as to entitle him to set it aside *ex debito justitiae*.

[3] Section 45(1) of the Hire-Purchase Act 1967 ('the Act') aims to ensure that all hire-purchase agreements are legibly drafted for easy reading by the hirer. By no stretch of the imagination can the Act be construed to mean that a failure on the hirer's part to initial each and every page of the hire-purchase agreement renders the same not to be in writing and, therefore, null and void.

[4] The appellant was entitled to rely upon cl. 9 of the guarantee executed by the respondent which provided that any notice of demand could be served upon him personally or sent by post to his last known address, which would be conclusively deemed as having been received within 48 hours after delivery. The postal receipt tendered by the appellant was conclusive and sufficient evidence of posting. The omission of the postal clerk's signature on the receipt should not be allowed to prejudice the appellant's case. Consequently, were no triable issues raised by way of defence to warrant resolution or determination at a trial.

[Appeal allowed with costs.]

Case(s) referred to:
Allied Bank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 ***(refd)***
Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 ***(refd)***
Ling Sie Tian v. Phek Peng Seng & Ors [1997] 3 CLJ Supp 24 ***(refd)***
Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 ***(refd)***
Tan Lee Hong v. Letchmee (Representative of the Estate of Varathen, decd) [1994] 2 CLJ 570 ***(refd)***
Tuan Hj Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 16, 17
Hire-Purchase Act 1967, s. 45(1)(a)
Interpretation Acts 1948 & 1967, ss. 3, 12
Post Office Rules 1947, O. 82(8)
Subordinate Courts Rules 1980, O. 7 rr. 1, 7A

For the appellant - Ting Soon Pang; M/s Yong & Wong
For the respondent - Irene Chang; M/s Wong Ho Leng & Co

Reported by K Ganesh

JUDGMENT

Clement Skinner J:

This is an appeal by MBf Finance Berhad ("the appellant") against the decision of the learned magistrate who, on 24 February 2000, set aside a judgment in default of appearance that had been entered against the second defendant Tiong Kieng Seng ("the respondent") on 11 March 1999. Costs were also awarded to the respondent.

The appellant had entered into a hire-purchase agreement with one Kayacom Resources Sdn Bhd ("the first defendant") of which the respondent is a director. Together with another director, he stood as guarantor to the hire-purchase transaction. On 2 November 1998 the appellant commenced these proceedings against the first defendant, the respondent as second defendant and the other guarantor as third defendant.

The summons was fixed for hearing on 11 March 1999 and the sum claimed against the defendants therein was RM23,775.50. In the guarantee and indemnity executed by the respondent on 19 August 1996, he gave his address as 1L, Jalan Emplan, 96000 Sibu. In fact, the first defendant as well as the third defendant gave that same address as their addresses in the hire-purchase agreement and guarantee respectively. There is no evidence, and I do not think there is any dispute that as at the date this action was commenced, the respondent had not informed or notified the appellant that he had changed his address from that stated in the guarantee.

Treating that address as the respondent's last known address, the appellant effected service of the summons on him by sending it by AR registered post addressed to 1L (1st floor), Jalan Emplan, 96000 Sibu. When the appellant's solicitors delivered the letter containing the summons to the postal authorities for posting, it was delivered together with several other letters and so the appellant's solicitors were given a receipt issued by the Post Office, Sibu, dated 10 November 1998, acknowledging that it had received for posting, amongst others, the appellant's letter dated 9 November 1998 which enclosed the summons to be sent to the respondent at the aforementioned address. In view of the issues raised in this appeal, it will be necessary to give a brief description of this receipt. It bears the heading "Pos Malaysia Berhad" under which appear in bold print the words "Kiriman Banyak Barang-Barang Berdaftar". The particulars stated in the body of the receipt show who the sender of the letter is, who the addressee is and his address, what registration number is assigned to the letter to be delivered and how much postage has been paid. At the bottom of the document, the following words appear "Tandatangan Pegawai Menerima Pejabat Post ... and "Cap Tarikh Pejabat Pos". At the top right hand of the receipt appear the words in brackets (Pos-R&P1B). I shall refer to this receipt as the "Pos-R&P1B receipt". It is obviously intended to acknowledge that the items mentioned therein have been received for posting in the manner therein described ie, AR registered post or registered post.

The appellant also produced a second receipt issued by the postal authorities showing that the AR registered letter it had sent to the respondent had been acknowledged as received by him on 11 November 1998. I will give a brief description of the second receipt. It bears the heading "Pos Malaysia Berhad" under which appear the words "Resit Serahan Benda Pos Berdaftar". At the top right hand corner of the receipt are the words in brackets (Pos-R&P2). The body of the receipt shows the post office from which the item delivered was sent out and to whom. At the bottom of the receipt are the words "Tandatangan Penerima dan No. Kad Pengenalan/Cop Rasmi" and "Tarikh Penyerahan". I shall refer to this receipt as the "Pos-R&P2 receipt". It is obviously a receipt that is intended to serve as an acknowledgment by the addressee that he has received the item mentioned therein.

On 11 March 1999 the respondent was not present when the summons was called on before the learned magistrate. Judgment in default of appearance was accordingly ordered to be entered against him. That was done on 28 April 1999. On 22 July 1999, the respondent was served with a bankruptcy notice founded on that judgment. According to him, that was the first indication he had about the bringing of these proceedings against him. He accordingly instructed his solicitors on the matter whereafter they obtained a copy of the judgment in default of appearance from the appellant's lawyers on 14 September 1999 and on 14 October 1999 made an application to set aside the judgment in default of appearance. The grounds relied upon by the respondent to set aside the said judgment were that it had been irregularly obtained and alternatively, that he had a defence on the merits to the appellant's claim.

The respondent alleged that the judgment had been irregularly obtained because he had never been served with or received the summons. To prove such non-service, the respondent relied upon the following facts and evidence:

(a) the Pos-R&P2 receipt which on its face shows that the letter enclosing the summons had been delivered to No. 11 (1st floor), Jalan Emplan, 96000 Sibu on 11 November 1998 (and not No. 1L (1st floor) Jalan Emplan);

(b) that the first defendant had an office at 1L (1st floor), Jalan Emplan but he had never been to this office;

(c) that the person who had received the AR registered letter addressed to him and who had signed the Pos-R&P2 receipt acknowledging receipt of that mail was a person named Mah Chee Ming the holder of identity card No. K0327161;

(d) that he had not authorised Mah Chee Ming to receive mail on his behalf and this is confirmed by Mah Chee Ming who has affirmed an affidavit to that effect;

(e) that Mah Chee Ming was employed by a company called Unity Privilege Sdn Bhd which had an office at No. 1L (ground floor), Jalan Emplan;

(f) that according to Mah Chee Ming, since about March 1997, the premises at No. 1L (1st floor) had been used only as a store which was kept locked at all times;

(g) that Mah Chee Ming had received the AR registered letter addressed to the respondent but like other letters, must have left it at the office premises. Mah Chee Ming is not aware if the letter was ever collected by anyone.

In so far as a defence on the merits to the appellant's claim was concerned, the respondent averred that no liability had arisen under the guarantee for two reasons. In the first place, the hire-purchase agreement was unenforceable and void as the hire-purchase agreement was entered into in respect of goods covered by the First Schedule to the Hire-Purchase Act 1967 and must, therefore, be in writing. However, the first defendant had not initialled or signed each and every page of the hire-purchase agreement, and this, according to the respondent, had the effect of rendering the hire-purchase agreement not to be in writing. Secondly, as a pre-requisite to an action against the respondent on the guarantee, there should first be a demand for payment made against the respondent. However, according to the respondent, he had never seen nor received any demand from the appellants by reason whereof, the summons issued against him was wrongful and premature.

The grounds and arguments advanced on behalf of the respondent found favour with the learned magistrate. In setting aside the judgment in default of appearance, he held, in essence, that as the summons was not received by the respondent but by Mah Chee Ming, the respondent was not aware of these proceedings as he was never served. The learned magistrate also found that the respondent had raised questions of law on the validity of the hire-purchase agreement which were best resolved at a proper trial. The appellant being dissatisfied with the above decision has brought this appeal.

The law on when a judgment in default may be set aside is well settled: where it has been irregularly obtained, it will be set aside as of right. See, *Tuan Hj. Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241. On the other hand, where a default judgment has been regularly obtained, a defence on the merits will have to be shown.

So, was the judgment in default of appearance entered against the respondent a regular or irregular judgment? The answer to that question depends upon whether the summons herein was properly served on the respondent, which in turn brings into sharp focus the question of what constitutes proper service of process in accordance with the Subordinate Courts Rules ("the SCR") 1980 and in particular, service by post.

It will be convenient at this stage to refer to the relevant provisions of the SCR regarding service of process. Order 7 r. 1 SCR provides that:

> Subject to the provisions of any written law and these rules, a summons must be served personally on each defendant or by sending it by prepaid acknowledgment returned (AR) registered post addressed to his last known address.

As proof of service of a summons by post, O. 7 r. 7A SCR provides that:

> In the case of service of a summons by prepaid registered post a written receipt given under the Post Office Rules 1947 shall be sufficient proof of service and of the date thereof.

The appellant says it has complied with every aspect of both sub-rules and therefore the judgment was not in any way irregular. The respondent, on the other hand, contends that the appellant has not and has sought to impeach service for several reasons, which I now consider in turn.

Attention was first drawn to the fact that the appellant had served the summons by AR registered post and not by prepaid registered post. According to counsel for the respondent, a distinction is to be drawn between these two modes of post because where a summons is sent by AR registered post (in accordance with O. 7 r. 1), the person employing such mode must go on to prove service by producing the duly acknowledged AR card or retour card. According to counsel, it is only in cases where the summons is served by prepaid registered post, that a written receipt given under the Post Office Rules 1947 will suffice to prove service (as provided in O. 7 r. 7A).

The submission of the respondent raises three points: first, by insisting that service of a summons sent by AR registered post is only proved when the duly acknowledged AR card is produced, what the respondent in effect says is that service of a summons sent by post is not effected until it is actually acknowledged as received by the addresses, of which fact the duly acknowledged AR card is evidence of. I regret I cannot agree with this proposition. It overlooks the fundamental difference between personal service and service by post. In the case of the former, actual physical

delivery is necessary whereas in the case of the latter proof of posting of the summons in the manner stipulated in the rule being complied with will suffice, whereafter a presumption that service has been effected will arise under s. 12 of the Interpretation Act 1967 which states:

> Where a written law authorises or requires a document to be served by post, then, until the contrary is proved, service:
>
> (a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and
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> (b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post.

I do not think that there can be any doubt that the Subordinate Courts Rules which are subsidiary legislation come within the definition of "written law" as set out in s. 3 of the Interpretation Act 1967 (see ss. 16 and 17 Courts of Judicature Act 1964 and *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56 and *Tan Lee Hong v. Letchmee (Representative of the estate of Varathen, decd)* [1994] 2 CLJ 570).

In *Allied Bank (Malaysia) Bhd. v. Yau Jiok Hua* [1998] 2 CLJ 33, Augustine Paul JC (as he then was) expressed similar views about the essential difference between personal service and service by post, although in that case he was talking about service by post of a notice of demand under a guarantee.

The second point raised by the respondent's submission involves an interpretation of the words "written receipt" found in O. 7 r. 7A. According to the respondent, the "written receipt" referred to in O. 7 r. 7A must be the receipt given by the addressee when acknowledging that the article sent by AR registered post has been duly received. According to the respondent, the words do not refer to the receipt issued by the postal authorities acknowledging that an article had been received for posting by AR registered post. I regret I do not agree with that contention. As I had stated earlier, where service is effected by post, the party resorting thereto must show proof of posting so as to be able to rely on the presumption of service. That party must, therefore, show that he has correctly addressed, prepaid and delivered to the post office the letter enclosing the summons and that it has been acknowledged as received by the postal authorities. The "written receipt" referred to in O. 7 r. 7A and which is given under the Post Office Rules 1947 must, therefore, in my opinion, refer to a receipt that possesses that character, that is, an acknowledgment by the postal authorities that the letter enclosing the summons has been received

for posting. For this reason, I agree with counsel for the appellant that the Pos-R&P1B receipt would be a "written receipt" given under the Post Office Rules 1947 within the meaning of O. 7 r. 7A.

Counsel for the respondent has expressed doubt on the evidential value of the Pos-R&P1B receipt because in practice it is prepared by the sender and not the postal authorities. I do not think that such fact would deprive the Pos-R&P1B receipt of its evidential value nor deprive it of its true character, that is, of constituting a "written receipt" to acknowledge that an article has been received for posting because it is the postal authorities which eventually authenticate it by affixing their postal seal and dating it when they accept the articles for posting. The Pos-R&P1B receipt would, accordingly, in my opinion, come within the definition of a receipt given under r. 82(8) of the Post Office Rules 1947 which states:

> Articles intended for registration must be presented at the counter of a post office and a receipt obtained for them.

When the Pos-R&P1B receipt is looked at, it shows that the postal authorities acknowledged that they had on 10 November 1998 received a letter to be delivered by AR registered post addressed to the respondent at No. 1L (1st floor) Jalan Emplan, 96000 Sibu for which postage of RM2 was paid and registration No. 2499 accorded to such mail. The appellant had, accordingly, by producing the Pos-R&P1B receipt as proof of posting proved service of the summons and of the date thereof in accordance with O. 7 r. 1 and O. 7 r. 7A.

I, however, agree with the submission of counsel for the respondent that the written receipt given under the Post Office Rules constitutes *prima facie* and not conclusive proof of service – it would not preclude or prevent a defendant from trying to show that there had been some irregularity in service because the presumption of service that arises under the Interpretation Act is a rebuttable one and, as often happens, where a summons is served by post and is not returned unserved, the court acts on the plaintiff's proof of posting and any documents relied on in support thereof at their face value when they are exhibited to an affidavit of service and will not be aware of any alleged irregularities or defects in service until challenged.

The third point raised by the respondent's submission concerns the question whether O. 7 r. 7A is confined in its application to summons that are served by prepaid registered post only and not to summons served by AR registered post by virtue of the omission of the words "acknowledgment returned (AR)" in the rule. I do not think it is. In my opinion, O. 7 r. 7A

would apply to a summons served by AR registered post as well because sending a summons by AR registered post is but a more sophisticated way of sending the summons by prepaid registered post. In this regard, useful guidance can be found in the case of *Amanah Merchant Bank Bhd. v. Lim Tow Choon* [1994] 2 CLJ 1. At issue in that case was the question whether a proper demand had been made under a guarantee if the notice of demand was sent by AR registered post when the guarantee stipulated a notice should be sent by post. In holding that it was, this is what Mohd. Dzaiddin SCJ (as the learned Chief Justice then was) had to say about the practical effect of sending a letter by registered post (at p. 4):

> ... the practical effect of sending a letter by registered post is quite apparent. It provides evidence of the posting and in the case of AR registered post, to borrow VC George J's words (in *Cooperative Central Bank Ltd. v. Dato' Seri Mohd. Adib Mohd. Adam & Ors*.) 'it is just a sophisticated version of the ordinary registered post.'

Although the Supreme Court was there considering the word 'post' in the context of a guarantee and we are here dealing with the words 'prepaid registered post' in r. 7A, I find the reasoning of the Supreme Court relevant and instructive because it is quite clear from the passage just quoted that the essential feature of sending a document by registered post is that it provides evidence of posting and therefore when one uses the more sophisticated AR registered post, its essential feature, like that of the prepaid registered post, is that it provides evidence of posting; upon a letter being received for sending by AR registered post, the postal authorities will issue a written receipt upon the article being received for registration and posting.

The respondent has submitted that even if there is *prima facie* proof of service of the summons on him, he is able to rebut any presumption of service in the two ways which I now turn to consider.

It was first said by the respondent that he had not been served because he could prove, by referring to the Pos-R&P2 receipt, that the summons was delivered to an address known as No. 11 (1st floor) Jalan Emplan, 96000 Sibu (when it should have been delivered to No. 1L (1st floor) Jalan Emplan, Sibu) and was there received by someone (Mah Chee Ming) who was never authorised by the respondent to do so. The question is, is the respondent correct in this assertion? For the reasons set out hereafter, I do not think he is.

There is evidence before the court that the summons was not delivered to No. 11 (1st floor) Jalan Emplan, 96000 Sibu as alleged by the respondent. The postman who delivered the AR registered letter enclosing the summons was one Edward Emprang anak Galing and he affirmed an affidavit to the effect that on 12 November 1998 he delivered three AR registered letters (one of which was addressed to the respondent) to No. 1L, Jalan Emplan which were received by a male person who said he was from Kayacom Sdn Bhd (the 1st defendant). That person signed for the AR registered letters and wrote his identity card number on the acknowledgment receipt ie, the Pos-R&P2 receipt. We now know that this person who received the letters was Mah Chee Ming. He has affirmed an affidavit in these proceedings in which he confirms that he received the AR registered letter addressed to the respondent at No. 1L Jalan Emplan, Sibu. Therefore, in the light of the evidence of the postman and Mah Chee Ming, the court is entitled to conclude that the summons was delivered to No. 1L, Jalan Emplan and what is stated in the Pos-R&P2 receipt, namely, that the summons was delivered to No. 11 (1st floor) Jalan Emplan is obviously a mistake.

It was next argued on behalf of the respondent that even if the writ of summons was actually delivered to No. 1L, Jalan Emplan 96000 Sibu, he can still prove that it was served on another person, other than himself, namely, Mah Chee Ming, and so the service is irregular and ought to be set aside *ex debito justitiae.* I regret I cannot agree with this contention. In effect, what the respondent is saying is that the appellant cannot show good service of the summons in accordance with O. 7 r. 1 unless the appellant can also prove that it was **actually** delivered to the addressee. To me, such a proposition imposes on a plaintiff an obligation which the words of O. 7 r. 1 plainly do not. The proposition also overlooks the essential distinction between personal service and service by post. I should also say that if the respondent's argument is correct then O. 7 r. 1 and O. 7 r. 7A can be rendered useless pieces of regulations by the simple device of a defendant allowing someone else to receive registered mail on his behalf and then both coming forward, one to deny having given the other authority to do so and the other to deny having been given the authority to do so.

I should further point out that in this case, the summons was not received by the respondent as a result of his own action. Even though he had in the guarantee given his address as No. 1L Jalan Emplan, 96000 Sibu, he has stated on oath that since the start of business of the 1st defendant he had **never** been to No. 1L Jalan Emplan and neither had he given anyone authority to receive mail sent to him at that address. What this means,

therefore, is that the appellant could never succeed in properly serving the summons on the respondent by post because it would never be received by him because he never ever went to that address and neither had he authorised anyone to receive mail on his behalf at that address.

In the result, I find that the appellant had served the summons herein in accordance with the requirements of O. 7 r. 1 and O. 7 r. 7A. The judgment in default of appearance entered consequent thereto was in every respect a regular judgment which the appellant was, by the rules, entitled to enter against the respondent. The respondent has not been able to show that it was irregularly obtained and would not therefore be entitled to set it aside as of right. He would need to show a defence of merits. Has he done so?

I had earlier in this judgment already set out in some detail what the respondent relies upon by way of defence. He contends that because the first defendant did not sign and or initial each and every page of the hire-purchase agreement, that agreement is not a document in writing and, therefore, contravenes s. 45(1)(a) of the Hire-Purchase Act 1967, which in turn renders the hire-purchase agreement void. As will be seen the issue raised is purely one concerning the interpretation of a section of the Hire-Purchase Act; it does not involve a dispute on the facts which requires to be resolved at a trial.

Section 45(1) of the Hire-Purchase Act reads:

> Any prescribed document or part thereof:
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> (a) not being the signature or initials of any person, that is in handwriting that is not clear and legible; or
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> (b) that is printed in type of a size smaller than the type known as ten-point Times,
>
> shall, for the purposes of this Act, be deemed not to be in writing.

What this section seeks to ensure is that every hire-purchase agreement is clearly and legibly written so that it can be read by the hirer. Therefore, if the hire-purchase agreement is in handwriting which is not clear and legible, or, if it is in printed form and the type used is smaller than ten-point Times, the section deems the document on which the handwriting or print appears not to be in writing. And sub-s. (a) of s. 45(1) makes it very clear by the words "not being the signature or initials of any person", that even if the signature or initials of the hirer is in handwriting and that signature or initials is not clear and legible, the document is not affected.

I regret that I cannot, even after reading the section with a most indulgent eye, see how it can be said that it requires a hirer to sign or initial on each page of the hire-purchase agreement failing which the agreement is not to be regarded as being in writing. The fact that every page of the hire-purchase agreement has not been signed or initialled by the hirer has absolutely no bearing on the clarity or legibility of the agreement. It does not require a trial of this action to see that this defence raised by the respondent is not plausible.

With reference to the other issue raised by way of defence, the respondent contends that there has been no prior demand on him for payment under the terms of the guarantee because the appellant has not been able to show that the respondent's letter of demand dated 23 September 1998 which was sent to him by registered post on 23 September 1998 was handed to the postal authorities for posting.

By cl. 9 of the guarantee, any notice or demand made on the respondent thereunder could be served on him personally or sent to him at his last known address or at his address given in the guarantee and if so sent by post, would be conclusively deemed to have been received by him within 48 hours after the time of posting.

To prove that it had complied with cl. 9 of the guarantee, the appellant has produced a receipt issued by the postal authorities on 23 September 1998 (exhibited as "MBf10" at p. 54 of the record of appeal) which shows that it had received for posting, a letter addressed to the respondent at No. 1L (1st floor) Jalan Emplan, 96000 Sibu. The receipt also shows that postage of RM1.30 had been paid for such posting and that the letter had been accorded registration No. 2147. The receipt also bears the Post Office seal or chop with a date. The respondent complains that the receipt abovementioned is not sufficient evidence of posting because the signature of the postal clerk who accepted the letter for posting does not appear on the receipt and, therefore, there is nothing to prove that the letter of demand had been handed or delivered to the Post Office. I regret I do not agree with this contention. The absence of the signature of the postal clerk on the receipt would not prevent the appellant from relying on the receipt as evidence that the letter of demand had been received for posting because there are other means by which that fact may be ascertained, namely, the other particulars written in the receipt showing what had been received for posting, the postage fee collected therefor, the authentication of the receipt by affixing of the postal seal or chop with a date thereon and its issuance and handing over to the appellant all of which would not be done if the letter had not been received for posting. In my judgment, the signature of

the postal clerk was but one of the particulars found on the receipt from which it can be determined that the letter was received for posting. It is also my view that if the postal clerk omits to put his signature on the receipt whether intentionally or unintentionally, I do not think the appellant should stand prejudiced by the act of a public officer over whom it has no control or direction.

In the circumstances, I find that there is clear evidence that the letter of demand had been delivered to the postal authorities on 23 September 1998 for posting to the respondent and that the appellant was well entitled to rely on the provisions of cl. 9 of the guarantee so that the respondent is conclusively deemed to have received the letter of demand within 48 hours of posting. I therefore find that no triable issue has been raised on the second ground relied upon by the respondent by way of defence.

Before concluding, there is a matter which I need to deal with. It was submitted by the respondent that the question of whether or not he had been served with the summons raises a triable issue which can only be resolved at a trial since that issue gives rise to disputed facts. In support the case of *Ling Sie Tian v. Phek Peng Seng & Ors.* [1997] 3 CLJ Supp 24 was cited. With the utmost respect, I decline to follow that decision. To me, the issue of service must be decided now and not at the trial because it is raised as the very basis for challenging the regularity of a judgment which the respondent seeks to set aside *ex debito justitiae*. A decision on that question cannot await resolution at the trial of this action.

In the result, I allow this appeal with costs. The decision of the learned magistrate is set aside and the judgment entered against the respondent restored.